

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

In re Petition of	)	MB Docket No. 12-208	
	)	CSR-8686-A	
<b>TIME WARNER ENTERTAINMENT</b>	)		
<b>COMPANY, L.P.</b>	)	Honolulu	HI0005; HI0006
	)	Kauai	HI0011
	)	Hickam AFB	HI0043
	)	Aliamanu	HI0058
For Modification of DMA	)	Kaneohe Marine Corps	HI0066
Station KLEI-TV	)	Pearl Harbor	HI0070
Mauna Kea Broadcasting Company	)	Barking Sands Naval	HI0098
Kailua-Kona, Hawaii	)	Kalaupapa	HI0107
	)	Maui	HI0113

**To: The Secretary**  
**For: Chief, Media Bureau**

**REPLY**

**TIME WARNER ENTERTAINMENT**  
**COMPANY, L.P.**

**EDWARDS WILDMAN PALMER LLP**  
1255 23rd Street, N.W. – 8th Floor  
Washington, D.C. 20037  
(202) 478-7370

Date: August 29, 2012

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## **SUMMARY**

The record in this proceeding strongly supports Time Warner Cable's request to modify the Designated Market Area ("DMA") of television station KLEI-TV, Kailua-Kona, Hawaii ("KLEI" or "Station") pursuant to Section 614(h)(1)(C) of the Cable Television Consumer and Competition Act of 1992 so as to remove the various unincorporated areas, incorporated municipalities and military installations (collectively, the "Communities") served by Time Warner Cable's systems located in Honolulu, Kauai, Kalawao, and Maui Counties (the "Systems"). Time Warner Cable's Petition for Special Relief (the "Petition") conclusively demonstrated that KLEI: 1) has never been carried in the Communities; 2) does not provide digital equivalent Grade B contour coverage to the Communities; 3) does not provide programming with specific focus on particularized issues and events involving the Communities; 4) does not have any measurable viewership in the Communities; and 5) has little to no economic nexus with the Communities. Furthermore, the Petition demonstrated that the Communities are extremely well-served by numerous broadcast and cable program services carried on the Systems.

KLEI and those commenters that have weighed in on its behalf have failed to refute any of these showings. KLEI and its supporters are unable to show the Station was carried historically in the Communities, cannot show digital equivalent Grade B coverage in the Communities, cannot point to specific examples of programming specifically targeted to the Communities, cannot show the Station is viewed in the Communities, and cannot demonstrate a specific economic nexus between Kailua-Kona and the Communities. As such, KLEI meets none of the legal requirements for any of the Communities to be considered part of the Station's local market for mandatory carriage purposes.

Knowing that it cannot satisfy any of the statutory criteria, KLEI has resorted to manipulation of its programming schedule and a request that the Commission simply ignore the statute and well established precedent in this area. The Commission should rebuff these desperate tactics. The COMMISSION has rightly looked skeptically upon programming changes that coincide with a market modification proceeding, and in this case, the last-second programming changes made by KLEI still do not provide evidence of specific local service to the Communities. Despite its claims, KLEI is not a special case because of its ownership situation, a limited amount of foreign language programming and its location in Hawaii. KLEI's twenty-eight year operational history is not negated by an ownership change that occurred almost a year ago, nor does its paltry amount of foreign language programming entitle it to classification as a specialty station. And KLEI has offered no compelling justification for why its location in Hawaii should exempt it wholesale from being evaluated pursuant to the statutory market modification criteria established by Congress.

In sum, Time Warner Cable's Petition definitively satisfies Section 614(h)(1)(C)'s criteria for market modification. KLEI is not entitled to state-wide distribution in areas where it provides no local service. Therefore, the Commission should grant the Petition and exclude the Communities from KLEI's DMA.

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<b>To: The Secretary</b>			
<b>For: Chief, Media Bureau</b>			

**REPLY**

Time Warner Entertainment Company, L.P. (“Time Warner Cable”), by its attorneys, and pursuant to Sections 76.7 of the Commission’s rules, herby responds to the Oppositions and comments filed in response to its Petition for Special Relief (the “Petition”) seeking exclusion of Time Warner Cable’s cable television systems (the “Systems”) serving unincorporated areas, incorporated municipalities and military installations located in Honolulu, Kauai, Kalawao, and Maui Counties (collectively, the “Communities”) from the Designated Market Area (“DMA”) of television station KLEI-TV, Kailua-Kona, Hawaii (“KLEI” or the “Station”). As demonstrated in the Petition and left unrefuted by KLEI and its supporters, the Station meets none of the legal requirements for any of the Communities to be considered part of the Station’s local market for mandatory carriage purposes. Moreover, there is also no justification for KLEI’s request for special treatment to ignore the statutory directives governing market modifications. As such,

KLEI's local market should be modified so as to relieve Time Warner Cable from any obligation to carry KLEI in the Communities.

**I.     LAWFUL APPLICATION OF THE APPROPRIATE STATUTORY FACTORS  
CLEARLY INDICATES THAT KLEI'S LOCAL MARKET DOES NOT  
INCLUDE THE COMMUNITIES.**

KLEI and its supporters have failed to submit even a shred of evidence to rebut Time Warner Cable's showing that KLEI does not satisfy any of the statutory factors for a finding that any of the Communities should be considered within its local market. To recap, Section 614(h)(1)(C) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")<sup>1</sup> directs the Commission, in evaluating requests to modify a station's local market, to consider four discreet factors:

[A]fford particular attention to the value of localism by taking into account such factors as –

(I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;

(II) whether the television station provides coverage or other service to such community;

(III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.<sup>2</sup>

As detailed in the Petition, and left unrefuted in KLEI's Opposition and in the supporting comments from third parties, KLEI meets absolutely none of these factors. As such, any lawful definition of KLEI's local market must exclude the Communities.

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<sup>1</sup> Pub. L. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. § 151 et seq.

<sup>2</sup> 47 U.S.C. § 534(h)(1)(C)(ii).

**A. KLEI Has No Record Of Historic Carriage On The Systems.**

The first statutory factor requires an assessment of the historical carriage, if any, of the station by the cable system or systems serving the affected communities.<sup>3</sup> The Petition demonstrated, and KLEI readily acknowledges, that Time Warner Cable's Systems serving the Communities do not currently carry KLEI and have never done so. KLEI also fully acknowledges that Hawaiian Telcom, the only other cable system serving any of the Communities, likewise has never carried the Station.<sup>4</sup> Similarly, KLEI's Opposition confirms that neither DirecTV nor Dish Network have ever carried the Station.<sup>5</sup> There is simply no record of any historic carriage of KLEI's signal by any MVPD serving any of the Communities.

KLEI asserts that this may soon change as it has filed a carriage complaint at the Commission to force Hawaiian Telcom to carry its signal and claims to have obtained indications from DirecTV and Dish Network that they might carry the Station at some point in the future.<sup>6</sup> Time Warner Cable notes that the Petition, if granted, would apply with equal force to Hawaiian Telcom's cable system, and thus KLEI's carriage complaint against Hawaiian Telcom may soon be moot. With regard to the DBS providers, KLEI does not provide copies of the referenced letters from DirecTV and Dish Network, so it is impossible to discern how feasible it would be for KLEI to actually obtain carriage, which it has failed to do despite supposedly obtaining these communications from the DBS providers six months ago.<sup>7</sup> But regardless, KLEI's assertions as to what may happen in the future are of no consequence as the Commission has repeatedly

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<sup>3</sup> 47 U.S.C. § 534(h)(1)(C)(ii)(I).

<sup>4</sup> Opposition of Mauna Kea Broadcasting Company, Inc., MB Docket 12-208 (filed Aug. 16, 2012) ("KLEI Opposition") at 2.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Id.

explained that hypothetical future events, plans or promises are not valid evidentiary considerations in market modification proceedings: “we cannot take potential future or hypothetical events into consideration as factors on which to base the current scope of a station’s market – we only look to historic facts and the circumstances presently before us.”<sup>8</sup> The proper standard focuses exclusively on historic (*e.g.*, existing or prior) carriage, not possible future carriage, and the plain, uncontroverted fact remains that no MVPD has ever carried KLEI in any of the Communities.

**B. KLEI Does Not Provide Coverage Or Other Service To Any Of The Communities.**

The second statutory factor addresses “whether the television station provides coverage or other service to such community.”<sup>9</sup> This factor requires an assessment of two separate issues – technical coverage of the station’s signal and the provision of local programming specifically targeted to events relating to the affected communities. As explained below, KLEI fails on both accounts.

**1. KLEI Does Not Provide Technical Service To The Communities.**

The Petition demonstrated that KLEI’s digital equivalent Grade B contour does not even remotely cover any portion of any of the Communities.<sup>10</sup> KLEI and its supporters readily concede that point. As the Commission has repeatedly held, a lack of Grade B contour coverage

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<sup>8</sup> George S. Flinn, Jr. v. Comcast Cable Communications, LLC, DA 12-1265, ¶ 13 (MB rel. Aug. 3, 2012). See also Avenue Cable TV Service, Inc., 16 FCC Rcd 16436, ¶ 20 (CSB 2001), aff’d 19 FCC Rcd 16116, ¶ 6 (“Market modification decisions are based on the facts as presented and current at the time, and cannot be based on as yet unrealized future events.”); Garden State Cable TV, 15 FCC Rcd 19645, ¶ 4 (CSB 1997).

<sup>9</sup> 47 U.S.C. § 534(h)(1)(C)(ii)(II).

<sup>10</sup> See Time Warner Entertainment Company, L.P., Petition For Special Relief, MB Docket 12-208 (filed July 13, 2012) (“Petition”) at Exhibit D.



over a cable system's communities is the relevant (and typically fatal) factor in determining that the station does not provide technical service, and thus is not local, to those communities.<sup>11</sup>

**2. KLEI Does Not Provide Adequate Programming Of Local Interest To Residents Of The Communities.**

As the Petition detailed, KLEI's programming lineup is dominated by re-runs of ancient syndicated programs and infomercials.<sup>12</sup> KLEI cannot deny that this non-local, general interest programming accounts for approximately ninety percent of all programming aired on the Station. The Petition also demonstrated that the limited amount of original programming aired on the Station focuses on the island of Hawaii (which contains none of the Communities).

As discussed in more detail in Section II below, subsequent to the filing of the Petition, KLEI sought to overhaul its slate of original programming and now claims in its Opposition that this proposed new programming is of interest to residents throughout all of the Hawaiian Islands. KLEI's self-serving and *post hoc* attempt to alter its long-standing failure to offer local programming tailored to any of the Communities is entitled to no weight. The Commission has rightly discounted previous efforts by stations facing market modifications to hastily manipulate their programming lineup in effort to demonstrate local service.<sup>13</sup> The new programming, which first appeared on KLEI's schedule after the filing of the Petition and was on KLEI's air for no more than two weeks (if at all) before KLEI filed its Opposition, is not sufficiently established to

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<sup>11</sup> See, e.g., Comcast Cable Communications, LLC, 26 FCC Rcd 14453, 14456-57 (MB 2011); Massillon Cable TV, Inc., 26 FCC Rcd 15221, 15225 (MB 2011); Time Warner NY Cable LLC, 22 FCC Rcd 16026, 16030 (MB 2007); Greater Worcester I at ¶¶ 18, 22.

<sup>12</sup> See Petition at 8-9. KLEI claims that it provides 17 hours per week of local programming, KLEI Opposition at 9, which barely eclipses the 15 hours of infomercials currently aired on the Station. See id. at Exhibit B. Prior to KLEI's *post hoc* alteration of its schedule in late July, the Station aired 23.5 hours of infomercials per week. See Petition at Exhibit G.

<sup>13</sup> See Comcast Cablevision of Danbury, Inc., 18 FCC Rcd 274, ¶ 11 (MB 2003) (refusing to credit programming released "near the pleading stage of a market deletion proceeding").

be seriously considered as part of the analysis. Thus, claims that this brand new programming establishes local service to the Communities are simply not credible.

Significantly, of KLEI's new offerings, the only three programs that KLEI can legitimately claim are directed specifically at residents off the island of Hawaii are all already offered to Time Warner Cable subscribers in the Communities where that programming is aimed. More specifically, Time Warner Cable has offered both the *Mayor's Report*<sup>14</sup> and *Honolulu City News*,<sup>15</sup> which are produced by Honolulu Municipal Television, to its viewers in Honolulu County on the PEG channel Olelo 54 for far longer than the few weeks that KLEI has carried such programming.<sup>16</sup> As best as Time Warner Cable can discern, *Eye on Hawaii* appears to be a real estate segment produced by Honolulu based station KHON,<sup>17</sup> which is carried on all Time Warner Cable lineups serving the Communities.<sup>18</sup> Thus, despite its hasty attempt to insert these programs into its lineup, KLEI cannot cite these programs as evidence of new or unique local service to the Communities as it is clear these programs were already being provided by Time Warner Cable.

Moreover, an examination of the remainder of KLEI's locally-originated programming shows that KLEI's claims about such programming (both old and new) are greatly exaggerated – all of the Station's locally-originated programming is still predominantly focused on the western portion of the island of Hawaii. For instance, KLEI touts its locally produced daily news cast,

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<sup>14</sup> This program is referred to both as the "*Mayor's Report*" and the "*Oahu's Mayor's Report*" by KLEI. See KLEI Opposition at 10, Exhibit B.

<sup>15</sup> The program is referred to as *City News* and "*HNL City News*" by KLEI. See id.

<sup>16</sup> See Honolulu Municipal Television, City Television Shows, <http://www1.honolulu.gov/csd/publiccom/hmtvsched.htm>; Petition at Exhibit A (Oahu Lineup) (showing carriage of Olelo VIEWS on channel 54).

<sup>17</sup> See KHON, Eye on Hawaii, <http://www.khon2.com/content/features/eyeonhawaii/default.aspx>

<sup>18</sup> See Petition at Exhibit A (showing carriage of KHON on all lineups).

*KLEI 6 News*, which was recently beefed up from an underwhelming five minutes per weekday to a still underwhelming ten minutes per weekday, claiming that it “provides coverage of both local and statewide issues.”<sup>19</sup> But the only news story that KLEI cites involved an event (irregularities during a primary election) that occurred on the island of Hawaii.<sup>20</sup>

KLEI fails to cite any news stories covering events on any of the other islands. Indeed, the August 20, 2012 *KLEI 6 News* (which, excluding commercial breaks, was only 6 minutes and 10 seconds in length) spent two-thirds of the broadcast on news relating to the island of Hawaii or of general interest. A mere thirty-seven seconds were spent discussing events relating specifically to Oahu (10 seconds of which were reading the temperature and chance of precipitation in Honolulu), nineteen seconds were devoted to events relating specifically to Kauai, and nine seconds were allocated to Maui (all of which involved reading the temperature and chance of precipitation).<sup>21</sup> No time was spent on events specifically relating to any other area of the Hawaiian Islands. In previous market modifications where a station claimed that its news broadcast served the communities at issue, the Commission has conducted an exacting community-by-community analysis to determine whether specific content was offered to each area.<sup>22</sup> Under this type of scrutiny it is obvious that KLEI’s brief newscast is hardly tailored to the needs of the Communities, all of which are already fully served by local stations with legitimate news operations. Furthermore, as the discussion in Section II below indicates, KLEI’s new programming is similarly deficient.

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<sup>19</sup> KLEI Opposition at 9.

<sup>20</sup> *Id.* at 9-10.

<sup>21</sup> *See* KLEI 6 News, August 20, 2012, *available at* [https://www.youtube.com/watch?v=hCDo\\_QXG9XI](https://www.youtube.com/watch?v=hCDo_QXG9XI).

<sup>22</sup> *See, e.g., Mountain Broadcasting Corporation*, 27 FCC Rcd 2231, ¶¶ 20-26 (MB 2012).

Even those commenters filing in support of KLEI cannot dispute the fact that KLEI's original programming focuses on the island of Hawaii and not the Communities. Honolulu Mayor Peter Carlisle states that KLEI "broadcasts programs focusing on that island [Hawaii],"<sup>23</sup> while Governor Neil Abercrombie concedes that KLEI's programs "primarily focus on news and events on the island of Hawaii."<sup>24</sup> Notably, neither KLEI nor any of its hand-picked supporters has pointed to even one program produced by KLEI itself that covers an event or issue specific to any community not located on the island of Hawaii.

**C. Other Oahu Based Stations Provide An Abundance Of Local Coverage To The Communities.**

Addressing the third factor, the Petition demonstrated that, in contrast to KLEI's total absence of local programming targeted to the Communities, Time Warner Cable's Systems already provide extensive local programming on a regular basis. Indeed, Time Warner Cable carries at least thirteen stations (KAAH (Honolulu and Maui only), KALO (Honolulu only), KBFD, KFVE, KGMB, KHET, KHNL, KHON, KIKU, KITV, KPXO (Honolulu only), KWHE (Honolulu only), and KWHM (Maui only)) airing a plethora of local news, sports and weather programs designed to address the unique interests of residents of the Communities.<sup>25</sup>

KLEI responds that this factor is only given weight where other stations are failing to serve communities at issue. That may well be true in a case considering whether to add communities to a station's market. But where, as here, a determination is sought to contract a station's market, and where that station has no programming serving the communities at issue but other stations do, the factor must certainly to be considered consistent with the statutory text.

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<sup>23</sup> Comments of Peter Carlisle, Mayor of Honolulu ("Carlisle Comments") at 1. All Comments cited herein were filed on August 16, 2012 in MB Docket 12-208.

<sup>24</sup> Comments of Neil Abercrombie, Governor of Hawaii, ("Abercrombie Comments") at 2.

<sup>25</sup> See Petition, Exhibit A.

As the Commission has explained in rejecting KLEI's very argument:

We reject [the] argument that carriage of other local stations should not be considered in evaluating a cable operator's deletion request. The notion that this factor should not be examined in the instant proceeding is contrary to the statutory directive. The 1992 Cable Act specifically provides that, in considering requests to either include or exclude communities from a station's television market, the Commission shall take into account factors such as the carriage of other local stations by a cable operator to the communities at issue. We have also stated, and reiterate here, that where a cable operator is seeking to delete a station's mandatory carriage rights in certain communities within its ADI, and it is clear that the station is not providing local service to those communities, the issue of local coverage by other stations becomes a factor to which we will give greater weight than in cases where a party is seeking to add communities. WCEE insists that such reasoning is inconsistent with our decision in a prior deletion case in which we held that "we do not believe the enhancement criterion should be used by a cable operator to bolster its request to delete communities from a station's television market whenever it could show that other stations in the market serve the cable communities." In using such language, we were asserting that a cable operator seeking to delete communities from a station's market could not simply point to the fact that it carried other local stations and, by that fact alone, satisfy its burden of proof. In other words, a cable operator's deletion request will not automatically be granted "whenever" it can show that it carries other local stations.<sup>26</sup>

The Petition included 200 pages of exhibits with detailed accounts of local programming broadcast by stations carried by Time Warner Cable covering events specific to the Communities. By contrast, as explained above, KLEI is unable to point to any unique programming whatsoever that it has produced to address activities in any of the Communities. Accordingly, the extensive amount of local programming tailored to the Communities that is broadcast by other stations carried by Time Warner Cable in the Communities is clearly a factor weighing heavily in favor of excluding the Communities from KLEI's market.

**D. KLEI Has No Viewership In The Communities.**

The final factor concerns community viewing patterns in cable and noncable homes. The Petition explained, and KLEI readily acknowledges, that it does not have any substantial

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<sup>26</sup> TCI of Illinois, Inc., 12 FCC Rcd 23231, ¶ 26 (CSB 1997) (emphasis added).

viewership, and no reportable audience ratings, cable or noncable, by residents in any of the Communities.<sup>27</sup> KLEI seeks to discount its admitted lack of viewership by seeking special treatment as a “new” or “specialty” station. As explained in Section III below, KLEI does not qualify for either status, and thus its lack of viewership in the Communities must be acknowledged as a factor requiring the grant of Time Warner Cable’s Petition.

**E. There Are No Material Economic, Shopping Or Labor Connections Between Kailua-Kona And The Communities.**

Finally, KLEI cannot overcome the fact that there are *di minimis*, at best, economic connections between Kailua-Kona, its city of license, and the Communities. KLEI does not deny that the enormous distances between, and vast ocean reaches separating, Kailua-Kona and the Communities greatly complicate any regular travel between them, and naturally results in a lack of day-to-day business and economic connections. Because of this, it is not surprising that KLEI cannot point to any significant data pertaining to any group of consumers or business people from the Communities who regularly shop or do business in Kailua-Kona or *vice versa*.

KLEI’s only response is that millions of tourists travel between all the islands of Hawaii each year by air.<sup>28</sup> Claiming inter-island air travel as proof of an economic connection between residents of the Communities and KLEI is highly dubious. First, any reported inter-island air travel statistics will first and foremost reflect the fact that all of the islands of Hawaii are popular vacation destinations for out-of-state and international visitors, most of whom travel first to Oahu’s hub airport before taking smaller flights to their final destinations on the other islands. Such air travelers are mostly not residents of the Communities travelling between islands, but

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<sup>27</sup> Petition at 11-13.

<sup>28</sup> KLEI Opposition at 6-7.

out-of-towners. Air travel by these tourists, which likely dominates the figures cited by KLEI, is of no relevance in determining whether residents of the Communities consider KLEI local.

Second, the figures cited by KLEI are aggregates for travel between all the Hawaiian Islands, not just between Kailua-Kona (located on the island of Hawaii) and the Communities. Here, where the task is to discern a specific economic nexus between Kailua-Kona and the Communities, travel between other islands such as between Maui and Kauai, or Lanai and Oahu, is of no relevance whatsoever. Without a specific figure for in-state resident travel between Kailua-Kona (or even just the Island of Hawaii) and the Communities, KLEI's inter-island air travel data is completely beside the point and should be disregarded. In any event, the undisputed fact remains that there are no established commuter mass transportation routes between Kailua-Kona and the Communities such as those found to establish a nexus among communities in other cases.<sup>29</sup>

The only relevant data that does exist, the Census Department's County to County Worker Flow Data for Hawaii Counties, which shows actual in-state resident travel patterns between the islands and the Communities, was supplied as Exhibit O in the Petition. This data demonstrates that the number of commuters between the islands containing the Communities and the Island of Hawaii, where Kailua-Kona is located, are truly *de minimis*. This data confirms that the required economic nexus between Kailua-Kona and the Communities simply does not exist.

KLEI's only other claim is that the existence of certain state-wide Hawaiian state governmental institutions, such as state health, education and cable regulatory bodies, as well as

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<sup>29</sup> See, e.g., WRNN License Company, LLC, 20 FCC Rcd 7904, ¶ 11 (MB 2005) (communities were added to station's market where they were connected with the station's city of license by major interstate highways and railroads).

a multi-island Congressional district, indicate the Hawaiian Islands are a state-wide market that includes both Kailua-Kona and the Communities.<sup>30</sup> This claim has limited relevance as such institutions hardly serve to demonstrate any material commercial and economic links between Kailua-Kona and the Communities. Other than making the bald inference, KLEI provides no specific explanation how the mere existence of these institutions indicates actual “economic, shopping or labor connections” between Kailua-Kona and the Communities. Further, Hawaii’s grant of cable franchises by a state agency is hardly unique. Many other states, including those as large as California, Texas, Wisconsin, North Carolina and Ohio, also have state-issued cable franchising, and no one could credibly claim that such states should be considered one unified local market for cable carriage purposes.<sup>31</sup> Finally, the Commission has never accepted the argument that a common Congressional district has any relevance as to whether the requisite economic nexus exists between communities.<sup>32</sup>

## **II. KLEI’S ATTEMPT TO MANIPULATE ITS PROGRAMMING SCHEDULE DOES NOT ALTER ITS FAILURE TO PROVIDE LOCAL SERVICE TO THE COMMUNITIES.**

The record shows that KLEI undertook an abrupt overhaul of its programming lineup that directly coincided with the filing of the Petition. Notably, this desperate charade did not result in a meaningful increase in the number of hours of original programming shown on the Station; KLEI’s lineup is still primarily comprised of general interest programming such as infomercials

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<sup>30</sup> KLEI Opposition at 7-8.

<sup>31</sup> Indeed, the state franchising agency, the Hawaii Department of Commerce and Consumer Affairs (“DCCA”), has implicitly acknowledged the individual character of the various islands served by Time Warner Cable by awarding separate franchises for each of its Systems, including two (east and west) on the island of Hawaii itself.

<sup>32</sup> See, e.g., Comcast Cable Communications, LLC, 26 FCC Rcd 14453, ¶¶ 13, 15 (MB 2011).



and forty year old sitcom re-runs that are likely of little interest to anyone.<sup>33</sup> In any event, KLEI should not be permitted to rely upon this nascent programming that clearly appears, at best, to be in a developmental stage. Claims by KLEI and its supporters that this two week old programming somehow establishes local service to the Communities are strained at best and outright deceiving at worst and should be dismissed accordingly. But, even if the new programming is considered, it still fails to prove that KLEI provides adequate programming with “specific ties to the communities at issue in this matter.”<sup>34</sup>

KLEI’s Opposition includes a programming schedule for the Station dated July 30, 2012, seven days after the filing of the Petition.<sup>35</sup> This programming schedule lists seven new shows, classified by the schedule as “Local Programs,” which are heavily relied upon by KLEI and supporting commenters in their attempts to show the Station provides local programming of interest to the Communities.<sup>36</sup> The Station’s website was also modified to list these new programs and to make other subtle tweaks to give the impression that the Station is not merely focused on issues relating to the Island of Hawaii. For instance, the description of KLEI’s news show has been changed from “Local Big Island News” to “Hawaii News.”<sup>37</sup>

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<sup>33</sup> See Petition at 8-9.

<sup>34</sup> Greater Worcester Cablevision, 12 FCC Rcd 17347 at ¶ 19 (CSB 1997).

<sup>35</sup> See KLEI Opposition, Exhibit B. TWC submitted the KLEI programming schedule that was available on the Station’s website as of the date of TWC’s filing of the Petition. See Petition, Exhibit G. That programming schedule is dated June 28, 2012.

<sup>36</sup> See KLEI Opposition at 9-12, Exhibit B. See also, e.g., Abercrombie Comments; Comments of Kristin Kawena Begay (“Begay Comments”); Carlisle Comments;; Comments of Benjamin J. Cayetano (“Cayetano Comments”); Comments of William P. Kenoi, Mayor of the County of Hawaii (“Kenoi Comments”); Comments of Curtis Muraoka; Comments of Brian E. Schatz, Lieutenant Governor of Hawaii (“Schatz Comments”).

<sup>37</sup> Compare Petition at 9-10 with KLEI Opposition, Exhibit B.

Because KLEI's Opposition was filed on August 13, less than two weeks after the new programs were introduced on the Station, the Commission should take into account that the programming hastily appeared within days of the filing of TWC's Petition when evaluating the legitimacy of KLEI's claims regarding this programming. In the past, the Commission has rightly looked skeptically upon this conduct, finding that programming launched near the pleading stage of a market deletion proceeding is of minimal value in determining local service because it is not "broadcast on a regular basis."<sup>38</sup>

Two weeks is an insufficient time period to establish that a program has been airing on a regular basis. Indeed, as might be reasonably expected given the short time frame, it appears that several of the new programs discussed by KLEI and others have produced a minimal amount of episodes. For instance, KLEI's website provides video for only one episode of *Healthy Hawaii*, *Education Matters*, and *Keiki 808*. KLEI provides no evidence to suggest these programs have additional episodes, but its descriptions of the new programming deceptively suggest that the programs are more established than they actually are.<sup>39</sup>

It is well established that the Commission cannot base a market modification decision "on programming that may or may not be aired at some future date."<sup>40</sup> The Commission must evaluate the "programming a station presently provides, not what it might provide in the

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<sup>38</sup> Comcast Cablevision of Danbury, Inc., 18 FCC Rcd at 279.

<sup>39</sup> For example, both KLEI's Opposition and the appended Declaration of Christopher Racine discuss the "recent episode" of *Healthy Hawaii* that included an interview with the President and CEO of Hawaii Health Systems Corporation, the obvious implication being that there are multiple episodes of the program. Opposition at 11, Exhibit A at 2. That "interview," which consisted of this official speaking into the camera for three minutes about a new health clinic in Kona (located on the western part of the Island of Hawaii) was included in the only episode of *Healthy Hawaii* that appears on KLEI's website. See *Healthy Hawaii*, KLEI, <http://www.klei.tv/local-shows/healthy-hawaii>.

<sup>40</sup> TCI of Illinois, Inc., 12 FCC Rcd 23231, 23241 (CSB 1997).

future.”<sup>41</sup> Given the lack of episodes for the new programs just introduced by KLEI, their listing on the Station’s program schedule should be discounted. There is no proof that further episodes of these programs will be produced, nor is there any evidence that future episodes would be specifically tailored to events in the Communities, rather than of general interest state-wide or beyond.

In fact, even if the new purported local programs are considered legitimate, the available evidence demonstrates that Time Warner Cable is already offering *Mayor’s Report*, *Honolulu City News* and *Eye on Hawaii*, the three new programs that are produced by third parties and specifically geared towards residents not living on the Island of Hawaii,<sup>42</sup> while the remaining new programs produced by KLEI fail to address issues or events specific to any of the Communities. KLEI’s claims about the new programming simply do not hold up when the programming is actually examined. For instance, KLEI represents that both *Education Matters* and the children’s program *Keiki 808* are “designed to educate the children of Hawaii on different and interesting topics throughout the islands,”<sup>43</sup> but the one episode available for each of these programs only features the Island of Hawaii. The episode of *Education Matters* consists solely of an interview with the co-director of a charter school located in Kailua-Kona, KLEI’s city of license.<sup>44</sup> And the one available episode of *Keiki 808* features a play performed at a nearby school, an interview with a local fireman and a trip on a boat off the coast of Kona, all of which appear to have occurred on the western portion of the island of Hawaii, where KLEI is

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<sup>41</sup> George S. Flinn, Jr., DA 12-1265, Docket Nos. 12-87, 12-114 (MB rel. Aug. 3, 2012).

<sup>42</sup> See supra Section I.B.2.

<sup>43</sup> Opposition at 11.

<sup>44</sup> See *Education Matters*, KLEI, <http://www.klei.tv/local-shows/education-matters>. The comments submitted by the host of *Education Matters* make clear that the program does not contain any content addressing the specific Communities, but rather addresses state-wide educational issues generally. See Begay Comments.

also located.<sup>45</sup> Similarly, the one available episode of *Healthy Hawaii* focuses on a medical facility near the Station in Kona and includes an interview with one of the doctors at that facility.<sup>46</sup> Thus, the “new” original programs that KLEI now touts, some of which consist of recycled footage from the older programs,<sup>47</sup> are much like the pre-existing KLEI programs in that they simply have little to no nexus to the Communities.<sup>48</sup>

### **III. THE STATUTORY FACTORS FOR MARKET MODIFICATION MUST BE APPLIED TO KLEI, WHICH IS NOT ENTITLED TO SPECIAL TREATMENT.**

Given that it can not argue that it is local to the Communities using the proper legal standards, KLEI resorts to claiming that it should be entitled to special treatment and that the legal standards of Section 614(h)(1)(C) should simply be ignored. According to KLEI and its supporters, KLEI should be afforded wide latitude to be considered “local” throughout the entire state because: (1) it is in essence a “new” station given that current owners took control of the Station in 2011;<sup>49</sup> (2) it is a “specialty station” providing specialized ethnic (Native American,

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<sup>45</sup> See Keiki 808, KLEI, <http://www.klei.tv/local-shows/keiki-808>.

<sup>46</sup> See Healthy Hawaii, <http://www.klei.tv/local-shows/healthy-hawaii>. Several of the commenters in this proceeding incorrectly state *Healthy Hawaii* is “hosted by State Senator Dr. Josh Green.” See Carlisle Comments at 1; Cayetano Comments at 1; Keno Comments at 1; Schatz Comments at 1. The episode of *Healthy Hawaii* on KLEI’s website includes a speech given by Senator Green at the opening of a local health facility, but in no way could an actual viewer of the program come away with the impression that Senator Green is the “host” of the show. Indeed, Senator Green’s comments submitted in this proceeding do not suggest that he is the host of *Healthy Hawaii*. See Comments of Josh Green. This unmistakable error casts doubt on whether these commenters actually viewed KLEI’s programming and in turn should beg the question of whether the commenters can credibly speak about the value of such programming to residents of the Communities.

<sup>47</sup> For instance, the one episode of *Healthy Hawaii* appears to be comprised in large part with content recycled from an episode of the show *Talk Story Hawaii*. See Healthy Hawaii, <http://www.klei.tv/local-shows/healthy-hawaii>; *Talk Story Hawaii*, KLEI, <http://www.klei.tv/local-shows/talk-story-hawaii/>.

<sup>48</sup> See Petition at 9-10.

<sup>49</sup> KLEI Opposition at 3.

Hawaiian language, Filipino and Hispanic) programming not available anywhere else;<sup>50</sup> and (3) the entire State of Hawaii is a unique context where all Hawaii residents share a common interest that transcends the vast distances and geographic barriers separating the islands.<sup>51</sup> Examination of Commission precedent indicates that none of these arguments have merit.

Commission precedent squarely refutes KLEI's claim that it is a "new" station due to a change of ownership in September 2011.<sup>52</sup> The Commission has explained that the touchstone for being given special latitude in a market modification proceeding as a "new" station is that the station actually be new, *i.e.*, constructed within the past three years. Thus, a "change in ownership . . . does not automatically reclassify it as a new station."<sup>53</sup> For example, in 2011, the Bureau held in Comcast Cable Communications, LLC that a station that existed for seven years would not be considered a "new" station in a market modification analysis, even though there was, as here, a subsequent change in ownership.<sup>54</sup> KLEI has been in operation for twenty-eight years (since 1984).<sup>55</sup> The Commission has repeatedly held that three years, at most, is the demarcation point between considering a station "new" for local market definition purposes.<sup>56</sup>

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<sup>50</sup> See id.

<sup>51</sup> See at 5-8.

<sup>52</sup> KLEI Opposition at 2-3.

<sup>53</sup> Comcast Cable Communications, LLC, 26 FCC Rcd 14453, ¶ 15 (MB 2011).

<sup>54</sup> Id.

<sup>55</sup> See Federal Communications Commission, CDBS, KLEI-TV, Call Sign History, [http://licensing.fcc.gov/cgibin/ws.exe/prod/cdbb/pubacc/prod/call\\_hist.pl?Facility\\_id=664&Callsign=KLEI-TV](http://licensing.fcc.gov/cgibin/ws.exe/prod/cdbb/pubacc/prod/call_hist.pl?Facility_id=664&Callsign=KLEI-TV). The station was originally licensed as KSHQ, changed its call sign to KVHF in 1986 and to KLEI in 1992 before becoming KLEI-TV in 2012. Id.

<sup>56</sup> Id.; Cox Comm. Las Vegas, Inc., 24 FCC Rcd. 7846, ¶ 18 at n. 60 (MB 2009) (holding that three years is the demarcation point between new and experienced stations); Avenue Cable TV Service, Inc., 16 FCC Rcd 16436, ¶ 22 (CSB 2001) (explaining that stations normally take up to three years to build viewership within their licensed areas.).

Accordingly, KLEI's twenty-eight year operational history clearly disqualifies it from claiming classification as a "new" station.

In addition, Commission precedent similarly does not support the claim that KLEI is a "specialty station" eligible for special treatment. The Commission has always limited the "specialty station" designation and its benefits in market modification proceedings to only those stations where more than one-third of the hours of an average broadcast week and more than one-third of the station's weekly prime time hours are devoted to religious or foreign-language programs.<sup>57</sup> Here, where such programming constitutes well under ten percent of KLEI's programming schedule, KLEI plainly fails to meet the criteria for special treatment under the definition of a specialty station.

In any event, KLEI's lack of digital equivalent Grade B coverage in the communities fatally undermines any special treatment that might be afforded to stations, unlike KLEI, that actually qualify for "new" or "specialty" status. While KLEI is correct that the Commission has discounted certain factors, namely historic carriage and significant viewing, for "new" and "specialty" stations, the Commission has still required Grade B coverage in these cases.<sup>58</sup> Thus,

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<sup>57</sup> See 47 C.F.R. § 76.5(kk) (1981) (*repealed*). Although that definition has been repealed along with the other signal importation quota rules, the Commission continues to take specialty station status into account in market modification proceedings by, for example, significantly discounting the absence of historic carriage or lack of ratings data as factors to be used against a specialty station. See, e.g., KTNC Licensee, LLC, 18 FCC Rcd 16269, 16278 (2003); Falcon Cable Systems Co. II, L.P., 18 FCC Rcd 23774, 23781 (2003), Nationwide Communications, Inc., 10 FCC Rcd 13040, 13043 (1995); Family Stations, Inc., 18 FCC Rcd 22916, 2292 (2003) ("In analyzing a specialty station's request to modify it[s] television market, historical carriage and local viewership are not as important in the analysis."). Furthermore, KLEI appears nowhere on the U.S. Copyright Office's certified list of specialty stations. See Cable Statutory License: Specialty Station List, 77 Fed. Reg. 18869 (2012).

<sup>58</sup> See, e.g., George S. Flinn, Jr. v. Comcast Cable Communications, LLC, DA 12-1265, ¶ 10 (MB rel. Aug. 3, 2012) ("With new or specialty stations, failure to establish either historic carriage or significant viewership is given lesser weight, and we typically rely more on a station's Grade B contour to delineate its market. However, the historic carriage and significant

these entire lines of argument are simply a desperate attempt to distract the Commission from KLEI's clear inability to refute the Petition based on the plain statutory factors.

Finally, KLEI and the Hawaii Department of Commerce and Consumer Affairs ("DCCA") suggest that the legal standards can be ignored because Hawaii is a special case.<sup>59</sup> The DCCA argues that the statutory factors should not preclude the Commission from finding an island market is unified, citing the Commission's decision involving a case where the island of Puerto Rico was modified into the market of station WVXF operating on the U.S. Virgin Islands.<sup>60</sup> The DCCA overlooks the fact that in that case, the Commission used the statutory factors to determine WVXF was local to Puerto Rico even though the station was a specialty station.<sup>61</sup> More specifically, the Commission found WVXF had a record of historic carriage in Puerto Rico, had a measurable Nielsen viewership in Puerto Rico, and had partial Longley-Rice contour coverage over Puerto Rico.<sup>62</sup> Moreover, WVXF provided numerous examples of programming specifically tailored to Puerto Rico and had a demonstrated economic nexus with

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viewership factors are not entirely discounted for new or specialty stations, nor are they exempt from the market modification process.").

<sup>59</sup> Time Warner Cable does not object to carrying KLEI throughout all of Hawaii County so long as KLEI fulfills its obligation under 47 C.F.R. § 76.61(a) to provide a good quality signal to Time Warner Cable's headend located in the eastern part of Hawaii County. Indeed, in response to KLEI's related carriage complaint, Time Warner Cable has offered to initiate such carriage immediately, and stands ready to commence such carriage expeditiously. To date, KLEI has not contacted any Time Warner Cable representative to take advantage of the opportunity to be carried throughout Hawaii County even though it claims to the FCC that "TWC's refusal to carry KLEI would significantly undermine the Station's ability to compete with other stations located in its area." KLEI Opposition at 3.

<sup>60</sup> See DCCA Opposition to Petition for Special Relief, MB Docket 12-208 (filed Aug. 16, 2012) (citing Petition for Modification of the Designated Market Area of Television Broadcast Station WVXF, 24 FCC Rcd 8264 (MB 2009)).

<sup>61</sup> See id. at ¶ 14, 16.

<sup>62</sup> See id. at ¶¶ 8, 14.

Puerto Rico as over 75 percent of the station's advertisers were located in Puerto Rico.<sup>63</sup> Neither the DCCA nor KLEI can claim any of these connections between KLEI and the Communities. It is undisputed that KLEI has no historic carriage in the communities, no measurable viewership, no signal coverage and an economic and programming connection that is, to put it most charitably, token in nature.<sup>64</sup>

The other market modification case cited by the DCCA and KLEI, G Force, L.L.C.,<sup>65</sup> involves the state of Hawaii, but does not stand for the proposition that Hawaii is so special that the statutory factors of Section 614(h)(1)(C) should not apply, nor does it support KLEI's claim that the Hawaiian Islands are indivisible for market modification purposes. G Force only held that a cable operator was not permitted to treat similarly situated broadcasters from the same location in Honolulu differently for market modification purposes.<sup>66</sup> Specifically, the cable operator in that case sought to exclude communities on the Island of Kauai from the markets of two Honolulu stations while not seeking similar market modifications for six other Honolulu stations that the cable operator wished to continue carrying. The Commission found that carriage of the other Honolulu stations was "indicative of the interest on Kauai in programming of Honolulu stations and is evidence of a market nexus between Honolulu and the cable communities in Kauai,"<sup>67</sup> thus the cable operator could not discriminate against the other Honolulu stations it did not wish to carry. In this case, there are no other television stations

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<sup>63</sup> See id. at ¶ 14, 16. In addition, the distances between the islands in the WVXF case (77 to 87 miles) are considerably less than most of the distances between KLEI and the Communities (which range from 66 to 293 miles). See id. at ¶ 8. See also Petition at Exhibit E.

<sup>64</sup> Notably, KLEI does not point to any Hawaiian-based advertisers not located on the Island of Hawaii to which it has sold advertisements.

<sup>65</sup> 13 FCC Rcd 10386 (CSB 1998).

<sup>66</sup> Id. at ¶ 11.

<sup>67</sup> Id.



licensed to Kailua-Kona, or anywhere on the Island of Hawaii, that are being, or have ever been, carried by Time Warner Cable's systems serving the Communities in Honolulu, Kauai, Kalawao, and Maui Counties (or by Hawaiian Telcom for that matter).<sup>68</sup> Thus, unlike in G Force, in this case there is no issue of Time Warner Cable singling out KLEI for exclusion, nor do Time Warner Cable's actions reveal any pattern of discriminatory conduct against the Station.

In sum, the statutory provisions governing market modification proceedings are intended to ensure that television stations, including new and specialty stations, only have carriage rights throughout their true local service areas. The must carry regime is not intended to be a tool for broadcasters to maintain such rights in areas for which no local nexus to the station exists, as is the case here. As the Bureau has previously stated, "the broadcast signal carriage rules were not intended to transform a station with a restricted market and service area into a regional super-station that must be automatically carried in every single community in an ADI. . . ."<sup>69</sup> The Commission must rebuff KLEI and its supporters' unprecedented attempt to accomplish precisely that by unjustly demanding state-wide distribution, including in the Communities in Honolulu, Kauai, Kalawao, and Maui Counties where KLEI has no local nexus.

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<sup>68</sup> It should be noted that KLEI is simply incorrect in claiming that Time Warner Cable operates a "single, master headend" that serves the entire state. KLEI Opposition at 8. Time Warner Cable in fact operates separate headends in Honolulu, Maui and Kauai Counties, and two headends in Hawaii County (one in Kona and one in Hilo). KLEI's claim that TWC "controls the fiber facilities" that link the Hawaiian Islands is also false as these facilities are operated by a third party. KLEI Opposition at 5 n.18. Thus, even if KLEI's carriage market was incorrectly defined to include the Communities, KLEI would be required to assume all costs and expenses associated with the delivery of a good quality signal to each of the four headends where it is not currently carried.

<sup>69</sup> See, e.g., Brownwood Cable Television Service, Inc., 15 FCC Rcd 19636 at ¶ 13 (CSB 2000) (quoting Time Warner Entertainment-Advance/Newhouse Partnership, 11 FCC Rcd 6541 at ¶ 25 (CSB 1996)); Rifkin/Narragansett South Florida CATV Limited Partnership, d/b/a Gold Coast Cablevision, 11 FCC Rcd 21090 at ¶ 26 (CSB 1996).


## CONCLUSION

Must-carry rights were given to qualified commercial television stations in order to support broadcast programming that is local in origination and focus. Time Warner Cable's Petition should be granted because it satisfies the criteria set forth in the 1992 Cable Act. In particular, KLEI is geographically removed from the Communities, and clearly does not provide local programming service to them, in contrast to the local stations carried on the Systems. In addition, KLEI has not been historically carried on the Systems and there is no record of any viewership of KLEI in the Communities. The facts demonstrated herein fall squarely within the parameters for finding that the Communities are "so far removed from a station that [they] cannot be considered part of the station's market." Therefore, the Commission should grant Time Warner Cable's Petition to exclude the Communities from KLEI's DMA.

The undersigned verify that they have read the foregoing Reply and, to the best of their knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact, is warranted by existing law, and is not interposed for any improper purpose.

Respectfully submitted,

**TIME WARNER ENTERTAINMENT  
COMPANY, L.P.**

By: 

Arthur H. Harding

Craig A. Gilley

Adam M. Copeland

**EDWARDS WILDMAN PALMER LLP**

1255 23rd Street, N.W. – Eighth Floor

Washington, D.C. 20037

(202) 478-7370

Its Attorneys

Date: August 29, 2012

**CERTIFICATE OF SERVICE**

I, Glenda Thompson, a secretary at the law firm of Edwards Wildman Palmer LLP, hereby certify that copies of the foregoing "Reply" were served this 29th day of August, 2012 via first-class mail, postage prepaid, upon the following:

KLEI-TV  
Christopher Racine – General Manager  
PO Box 235770  
Honolulu, HI 96823

Keali'i S. Lopez, Director  
Donn Yabusaki – Cable TV Administrator  
State of Hawaii  
Dept. of Commerce and Consumer Affairs  
335 Merchant Street, Room 101  
Honolulu, Hawaii 96813

Mayor William P. Kenoi  
County of Hawaii  
25 Aupuni Street – Suite 2603  
Hilo, Hawaii 96720

Mayor Peter B. Carlisle  
City & County of Honolulu  
530 South King Street  
Honolulu, HI 96813

Jose Villa, Publisher  
Hawaii Hispanic News  
PMB 344  
P.O. Box 30800  
Honolulu, HI 96820

Steven Golden  
Vice President, External Affairs  
Hawaii Telcom Services Company  
1177 Bishop Street  
Honolulu, HI 96813

Gregory Vogt, Esq.  
2121 Eisenhower Avenue  
Suite 200  
Alexandria, VA 22314

Harry F. Cole, Esq.  
David A. Kirkpatrick, Esq.  
Fletcher Heald & Hildreth, PLC  
1300 N. 17th Street – 11th Floor  
Arlington, VA 22209

Bruce A. Olcott, Esq.  
Squire Sanders LLP  
1200 19th Street, N.W. – Suite 300  
Washington, DC 20036

Senator Joshua Green  
Hawaii State Capitol  
Room 222  
Honolulu, HI 96813

Maile David  
86-4310 Mamalahoa Highway  
Captain Cook, HI 96704

Lt. Governor Brian Schatz  
Hawaii State Capitol  
Fifth Floor  
Honolulu, HI 96813

Benjamin Cayetano  
1926 Okoa Place  
Honolulu, HI 96821

Major General Darryl D.M. Wong  
State of Hawaii Department of Defense  
3949 Diamond Head Road  
Honolulu, HI 96816

Curtis Muraoka  
West Hawaii Explorations Academy  
Hawaii Public Charter Schools Network  
P.O. Box 3017  
Aiea, HI 96701

Kristin Kawena Begay  
Hawaii State School Psychologist  
81-1080 Konawaena School Road  
Kealahou, HI 96750

Governor Neil Abercrombie  
Hawaii State Capitol  
Executive Chamber  
Honolulu, HI 96813



Glenda Thompson